

ISSUES

The Administrative Law Judge found claimant entitled to permanent partial general body disability benefits based upon a work disability. The respondent and insurance carrier appeal that finding by the Administrative Law Judge and request the Appeals Board limit disability to claimant's functional impairment. Thus, the sole issue for determination by the Appeals Board is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Appeals Board finds that the findings of fact and conclusions of law as enumerated in the Award of the Administrative Law Judge are accurate and appropriate. The Appeals Board adopts all findings made by the Administrative Law Judge that are not inconsistent with the expressed rulings made herein.

The Appeals Board adopts the analysis of the Administrative Law Judge regarding work disability as it is supported by the evidence. However, Finding No. 4 by the Administrative Law Judge concerning the opinion testimony offered by the vocational rehabilitation expert witnesses requires some clarification. Mr. Jerry Hardin testified that in his opinion, claimant's ability to perform work in the open labor market had been reduced by fifty-five to sixty-five percent (55-65%) based upon the restrictions recommended by Dr. Schlachter and by forty to fifty percent (40-50%) using the restrictions recommended by Dr. Eyster. However, Mr. Hardin utilized incorrect information concerning claimant's average weekly wage at the time of his injury in arriving at his opinion concerning the extent to which claimant's ability to earn a comparable wage had been diminished as a result of his accident and resulting disability. The parties stipulated to a pre-accident wage of \$11.90 per hour. The evidence establishes that claimant is capable of earning \$8.50 per hour and that he has actually engaged in work in the open labor market at this hourly rate since his accident. The Appeals Board agrees with the finding by the Administrative Law Judge that claimant had an actual wage loss from \$11.90 to \$8.50 per hour thereby giving him a reduction in his ability to earn a comparable wage of twenty-nine percent (29%).

Mr. Robert Schmidt, on the other hand, testified that in his opinion claimant had a reduction in his ability to perform work in the open labor market of twenty-nine percent (29%) based upon the restrictions of both Dr. Eyster and Dr. Kortje and forty-seven percent (47%) based upon those recommended by Dr. Schlachter.

The Appeals Board agrees with the finding by the Administrative Law Judge that claimant has proven a work disability. Pursuant to *Hughes v. Inland Container Corp.*, 247 Kan. 407, 799 P.2d 1011 (1990) permanent partial disability is to be determined by the extent (percentage) of reduction of the employee's ability to perform work in the open labor market and the employee's ability to earn a comparable wage. Both prongs of this two-part test must be considered in light of the employee's education, training, experience and capacity for rehabilitation. K.S.A. 1990 Supp. 44-510e(a). We likewise agree with the Administrative Law Judge that the facts in this case do not suggest that either element should be given greater weight. Similarly, the opinions of the medical experts and vocational experts should all be taken into consideration in arriving at a percentage of work disability. In applying the *Hughes* rationale to these components, as to the Administrative Law Judge, we find the claimant to have sustained a thirty-three percent (33%) permanent partial work disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark entered in this proceeding on

February 15, 1994, should be, and hereby is, affirmed in all respects, and the orders contained in the Award are hereby adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of March, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, KS
Anton C. Andersen, Kansas City, KS
Steven Foulston, Wichita, KS
John D. Clark, Administrative Law Judge
George Gomez, Director